APPENDIX I

Pertinent Provisions of Contract Document Showing Patent Error in Road Commissioner's Interpretation and Which Trial Court Refused to Interpret.

A. Provisions contained in *Special Provisions and Specifications Pertaining to Dam Construction* authorizing payment for dam construction under Item 3, termed Borrow Pit Excavation.

(1) In The Bid Proposal Directions and On The Plans and Drawings:

The Instructions under "note" on the Proposal Form, Schedule of Prices, page 3, and the directions on Sheet 2 of the 7 Sheets of Plans styled "Conservation Commission of West Virginia, Division of Engineering, Castleman Run Lake No. 1., Brooks and Ohio Counties," (both part of Complaint Exhibit A) provides as follows:

> "Dam and causeway are to be constructed of selected *borrow material obtained from the roadway excavation,* core trench excavation, and spillway excavation. This material shall meet the specifications of the Conservation Commission of West Virginia Item 3 and shall be placed in accordance to their specifications. *The cost of selecting and segregating the material, hauling and placing, compacting, and all work necessary in completing the dam and causeway shall be included in the unit cost bid for Item 3 and Item 6.*" (Italics supplied). (Items 3 and 6 and respectively "Borrow Pit Excavation" and "Causeway Embankment Fill"—Ed.).

(2) In The Specifications:

The contract included under the dam and causeway construction an item of work designated Item 3, "Borrow Pit Excavation" (Exhibit A—Proposal, Schedule of Prices, p. 2, Line 10). The dam construction covered by this item and to be paid for by the quantity of material used, is specifi-

cally described in section 3.14 of the "Technical Specifications, Castlemen Run Lake No. 1" (p. 6) (part of Complaint Exhibit A and being a "Special Provision") which reads as follows:

"ITEM NO. 3 BORROW PIT EXCAVATION
3.3 EMBANKMENT

The work covered by this item consists of furnishing all labor, materials and equipment and performing all the excavation and other operation in connection with the construction of embankments, as shown on the plans or as directed by the Engineer.

The term "embankment" shall mean the earth fill portion of the dam.

3.14 BASIS OF PAYMENT

Work under this item shall include the furnishing of all labor, plant and materials necessary for the construction of an earthen embankment and outlet channels in accordance with the drawing and specifications, work to include diversion of creek, cofferdams, stripping, excavation from designated borrow areas and embankment site, transportation and placement of material for embankment construction including clay core, disposal of unsuitable material, grading, compaction of fill with proper moisture content, scarification, backfill adjacent to structures in Item 5, together with any other incidentals necessary to this operation and payment will be made at the price bid per cubic yard measured as excavated from the borrow areas."

B. Provision contained in Road Commission's *Standard* Specifications Roads and Bridges pertaining to Borrow.

Section 2.3.1 page 54, of "The State Road Commission of West Virginia, Standard Specifications Roads and Bridges, Adopted 1952" (414 page blue printed volume—part of Complaint Exhibit A) provides as follows:

"BORROW EXCAVATION
2.3.1 DESCRIPTION

This item shall consist of excavating, transporting, place and finishing material *to complete the roadway and embankments; which material is not obtainable from any other item of excavation or within the limits of the right-of-way.* Borrow Excavation shall be obtained from Borrow Pits as noted on the Plans or otherwise designated by the Engineer, sites for which will be secured and paid for by the Commission." (Italics supplied).

On the supposed basis that the application of this *standard* provision precluded payment for the dam construction under Item 3, Borrow Pit Excavation, the Road Commissioner refused payment, on the ground the material used in the dam came from the right of way excavation, *notwithstanding the proposal, special provisions and plans as heretofore set forth expressly directed it be taken from roadway excavation,* and notwithstanding that by other provisions of the standard specifications hereafter set forth, the proposal, special provisions and plans governed and took precedence over the *standard* specifications.

C. Provision contained in Road Commissions Standard Specifications, Roads and Bridges, giving precedence to proposal, special provisions and plans over standard specification in case of discrepancy or conflict.

Section 1.5.4, page 17, of "The State Road Commission of West Virginia, Standard Specifications, Roads and Bridges, Adopted 1959" (blue printed volume part of Complaint Exhibit A) *designed to give controlling effect to the proposal, plans and any documents which are specially drafted with reference to the particular project,* (as was the "Technical Specifications, Castlemen Run Lake No. 1" for the dam) reads as follows:

"1.5.4 CO-ORDINATION OF SPECIFICATIONS AND PLANS:

These specifications, the Plans, special provisions, and all supplemental documents are essential parts of the contract, and a requirement appearing in one is as binding as though appearing in all.

They are intended to be complementary, to describe and provide for a complete work. *In case of discrepancy,* figured dimensions shall govern over scaled dimensions, *Plans shall govern over Specifications, proposals and special provisions shall govern over both Specifications and Plans.* The Contractor shall not take advantage of errors or omissions in the Plans or of any discrepancy between the Plans and Specifications." (Italics supplied).

The Standard Road Specifications do not cover dam construction, and the dam work was for the Conservation Commission. Accordingly, section 1.4.3 of the Standard Road Specifications is also of applicability and it reads as follows:

"1.4.3 SPECIAL PROVISIONS:

Proposed work or requirements not covered by these specifications will be covered by special provisions. The special provisions shall govern the work as though part of these specifications and shall take precedence whenever in conflict therewith." (Italics supplied).

The "Technical Specifications, Castlemen Run Lake No. 1" (for the dam) describes in detail each of the eight items for dam and causeway construction, and Item 3, "Borrow Pit Excavation," takes up over four single-spaced legal size sheets, describing the work involved in the item. The last section of this item, "3.14 Basis for Payment," previously quoted, states that for the dam construction work "payment will be made at the price bid per cubic yard" of "Borrow Pit Excavation."

Without the application of any rules of construction, the

contract is express as to meaning and the Road Commissioner's "interpretation" is violative of the contract as prepared by the Road Commission itself, and patently wrong.

APPENDIX J

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th day of March, 1965, the following order was made and entered, to-wit:

R. C. WETHERALL, JR.

VS. Civil Action No. 3921

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION,

BURL A. SAWYERS, AS STATE ROAD COMMISSIONER, AND PAUL PRICE,

Defendants Below,

PAUL PRICE,

Cross-Claimant Below

On a former day, to-wit, January 6, 1965, came the petitioners, R. C. Wetherall, Jr., by Carney M. Layne and Claude M. Morgan, his attorneys, and Paul Price by Marshall, Harshbarger & St. Clair and James W. St. Clair, his attorneys, and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Kanawha County rendered in this action on the 21st day of May, 1964, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the appeal prayed for is refused.

A True Copy

Attest: KENNETH E. HINES
Clerk Supreme Court of Appeals